BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	CC Docket No. 96–98
Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers	CC Docket No. 95–185

COMMENTS
of the
GENERAL SERVICES ADMINISTRATION

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May 26, 1999

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Summary

In these Comments, GSA urges the Commission to prescribe a minimum group of network elements that should be available to all competitors, because uniform requirements would help to foster competition throughout the nation. The list should include the network elements previously designated by the Commission, and also include elements such as packet switches, which have become increasingly important as technology has evolved since the Commission issued its *Local Competition First Report and Order* in 1996.

The ability of competitive LECs to obtain the required capabilities from a source other than the incumbent LEC — by self–provisioning or through another carrier — will vary significantly among localities. In any area where a network element on the "minimum" list is not otherwise available, the incumbent LEC should be required to unbundle its network to provide that capability. In cases where there are disputes concerning the need for a network element, regulators should have confidence that the ability of competitors to serve their own customers will not be impaired before excusing an incumbent LEC from unbundling.

Reliance on specific, quantifiable measures, such as cost and implementation schedule, will provide the greatest possible degree of uniformity in applying unbundling requirements over a period of time in the same or dispersed geographical areas. For example, GSA suggests that if it would cost competitors 10 percent more (in future discounted costs) to self–provision or to obtain an element from another source, unbundling should be required to avoid economic barriers to competition in a locality.

GSA offers several additional recommendations to improve the effectiveness of unbundling requirements. For example, GSA urges the Commission to include a measure of compliance in the price cap plan for incumbent LECs. Also, in view of the Supreme Court's decision, GSA recommends that the Commission affirm its previous decision to require incumbent LECs to combine network elements.

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GENERAL SERVICES ADMINISTRATION

The General Services Administration ("GSA") submits these Comments on behalf of the customer interests of all Federal Executive Agencies ("FEAs") in response to the Commission's Second Further Notice of Proposed Rulemaking ("Notice") released on April 16, 1999. In the Notice, the Commission seeks comments and replies on issues concerning the requirements for unbundling network elements set forth in Section 251 of the Telecommunications Act of 1996.[1]

I. INTRODUCTION

Pursuant to Section 201(a)(4) of the Federal Property and Administrative Services Act of 1949, as amended, 40 U.S.C. 481(a)(4), GSA is vested with the responsibility to represent the customer interests of the FEAs before Federal and state regulatory agencies. The FEAs require a wide array of interexchange and local

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1 Telecommunications Act of 1996, Pub. L. No. 104–104, 110 Stat. 56, *codified at* 47 U.S.C. §§ 151 *et seq.* ("Telecommunications Act").

telecommunications services throughout the nation. From their perspective as end users, the FEAs have consistently supported the Commission's efforts to bring the benefits of competitive markets to consumers of all telecommunications services.

The Telecommunications Act imposes a duty on incumbent local exchange carriers ("LECs") to provide access to unbundled network elements ("UNEs") at any technically feasible point at rates, terms and conditions that are just, reasonable, and non–discriminatory.[2] In August 1996, the Commission adopted the *Local Competition First Report and Order*, which prescribed rules implementing unbundling requirements and other provisions of the legislation.[3] Soon after the order was released, incumbent LECs and state commissions filed challenges to the Commission's unbundling rules that were consolidated in a proceeding before the U.S. Court of Appeals for the Eighth Circuit. In 1997, the Eighth Circuit ruled on these claims, rejecting arguments by the appellants that the Commission had not correctly applied the standards in the Telecommunications Act for designating UNEs.[4] These findings were appealed to the U.S. Supreme Court.

On January 25, 1999, the Supreme Court issued its decision in *AT&T v. Iowa Utilities Board*, which affirmed in part and remanded in part the Eighth Circuit's decision.[5] The Court held that the Commission has general jurisdiction to implement the provisions of the Telecommunications Act, and specific rulemaking authority with respect to the parts of the legislation concerning requirements for carriers to unbundle

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2 Telecommunications Act, Section 251(c)(3).

3 *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96–98, First Report and Order, 11 FCC Rcd 15499 (1996) ("*Local Competition First Report and Order*").

4 *Iowa Utils. Bd. v. FCC*, ("*Iowa Utils. Bd.*") 120 F.3d 753, 808–10 (8th Cir. 1997).

5 *AT&T v. Iowa Utils. Bd.* __U.S.__, 119 S. Ct. 721 ("*AT&T v. Iowa Utils. Bd.*").

their networks.[6] However, the Court found that the Commission had not adequately considered the "necessary" and "impair" standards for designating UNEs in the Telecommunications Act. Consequently, the Court ruled that the Commission's list of UNEs should be vacated, and the matter remanded for further proceedings.[7]

The Notice responds to the Supreme Court's ruling. In the Notice, the Commission tentatively concludes that it should prescribe a minimum group of network elements. The Commission requests comments on that tentative conclusion. The Commission also requests parties to provide recommendations concerning the UNEs to be included in this baseline list, as well as recommendations for steps to ensure that "necessary" and "impair" standards are applied uniformly throughout the nation.

II. THE COMMISSION SHOULD PRESCRIBE A MINIMUM GROUP OF NETWORK ELEMENTS THAT SHOULD BE AVAILABLE TO ALL COMPETITORS.

A. A uniform list of network elements would help to foster competition in all parts of the nation.

Access to a variety of network elements is necessary for competitors to structure services that meet the needs of their customers. To emphasize the importance of this issue to end users, GSA participated at the start of this proceeding by filing Joint Comments with the U.S. Department of Defense ("DOD") in response to the initial NPRM released on April 19, 1996.[8] In that submission, GSA/DOD explained the need to ensure that UNEs are available to all potential competitors on economically efficient terms in all localities.[9] Although LECs are deploying new technologies to meet the

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6 Notice, p. 5, n. 14.

7 *AT&T v. Iowa Utils. Bd.*, at 733–36.

8 Comments of GSA and the U.S. Department of Defense, May 16, 1996.

9 *Id.*, pp. 7–10.

demands for high–capacity services, the basic needs of competitors to offer services to their subscribers have not changed.

As the cornerstone of a pro–competitive policy concerning UNEs, GSA urges the Commission to adopt the proposal in its Notice to prescribe a minimum group of network elements that must be available to all competitors. If a competitor does not have access to one of these elements through self–provisioning or another means, the incumbent LEC should be required to unbundle its network so that the ability of the competitor to offer services to its own subscribers will not be impaired.

A minimum list of UNEs is vital for end users such as the FEAs, who require local telecommunications services in communities throughout the nation. A consistent list will facilitate rapid and uniform development of competition, because it will serve as a baseline for areas where state regulators have not addressed unbundling needs, or have become embroiled in disputes that are delaying the implementation of pro–competitive unbundling policies.

Moreover, uniform unbundling standards will help state regulators to conduct arbitrations with multiple competitive carriers without the need to establish basic requirements for unbundling in each instance. In addition, a minimum list will provide greater assurance that all requesting carriers, including small carriers with a limited geographical presence, will be able benefit from the economies of scale often available only to incumbent LECs.

B. The "minimum" list should include all of the elements previously designated by the Commission.

In the *Local Competition First Report and Order*, the Commission prescribed a "minimum" list of network elements that must be unbundled by all incumbent LECs.[10] Moreover, the Commission ruled that state regulatory authorities should be free to

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10 Notice, para. 13, citing *Local Competition First Report and Order*, para. 366.

prescribe additional elements, and parties should also be free to agree on additional elements in the voluntary negotiation process.[11] The Commission designated seven UNEs as a minimum list for unbundling: (1) local loops; (2) network interface devices; (3) local and tandem switching capability; (4) interoffice transmission facilities; (5) signaling and call-related databases; (6) operations support systems functions; and (7) operator services and directory assistance facilities.[12] GSA urges the Commission to include all of these elements on the "minimum" list.

These seven elements were designated for unbundling on the basis of detailed analyses of their network functions, as well as comments by state regulators, carriers, and end users.[13] Putting aside for the moment questions of whether competitors in an area can obtain these elements from a source other than incumbent LECs, there is no question that these functionalities are minimum requirements for competitive LECs to provide services to their own end users.

The value of the Commission's list of UNEs has been demonstrated by the actions of state regulators and carriers negotiating interconnection agreements during the past three years. For example, regulators in Maryland adopted a structure similar to the Commission's plan.[14] Parties negotiating interconnection arrangements have also used the Commission's list as a foundation. Again using Maryland as an example, an interconnection agreement between a large competitive LEC and the incumbent carrier identifies twelve UNEs that the incumbent carrier must provide: (1) local loop; (2) network interface device; (3) local switching; (4) operator systems; (5) common transport; (6) dedicated transport; (7) signaling link transport; (8) signaling

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11 *Id.*

12 *Local Competition First Report and Order*, para. 366.

13 *Id.*, paras. 226–529.

14 Maryland Public Service Commission Order No. 74671, issued November 2, 1998.

transfer points; (9) service control points/databases; (10) tandem switching; (11) directory assistance; and (12) operations support systems.[15]

These UNEs, which are also listed in other approved interconnection agreements between the same incumbent carrier and other competitive LECs in the state, include all seven network elements designated by the Commission in 1996. Indeed, the Commission's list of network elements has proven to be a valuable guide in formulating interconnection agreements.

C. Designation of additional elements is warranted by changes in technology.

GSA urges the Commission to extend the list of network elements to accommodate major changes in network architecture since 1996. Carriers are implementing significant network changes to facilitate provision of advanced telecommunications services through packet switched networks and digital subscriber line ("DSL") technologies. The minimum list of UNEs should accommodate these changes, or competitive LECs will be prevented from participating actively in the most rapidly growing telecommunications markets.

The Commission states that there is no provision of the statute or the Supreme Court's opinion that would preclude a requirement that unbundled local loops must be conditioned in a manner that permits requesting carriers to provide advanced telecommunications services.[16] GSA concurs with this conclusion, which also suggests that DSL access multiplexers as well as packet switches should be included in the "minimum" list of UNEs.

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15 Interconnection Agreement between AT&T Communications of Maryland, Inc. and Bell Atlantic–Maryland approved by the Maryland Public Service Commission on August 27, 1997.

16 Notice, para. 32

GSA addressed the importance of unbundling in allowing competitors to operate in a digital environment in the proceeding convened by the Commission last year to develop procedures concerning provision of advanced telecommunications services by wireline carriers.[17] In comments submitted in that proceeding, GSA explained that if an incumbent LEC employs a digital loop carrier ("DLC") and refuses to allow access at the remote terminal, it can effectively deny competitors' entry into the local loop market.[18]

Other evolutions in technology also lead to the need to designate additional UNEs. For example, as GSA explained in a proceeding to address the structure of telecommunications networks, it is appropriate to designate dark fiber as an unbundled network element.[19] In comments submitted to the Commission in that proceeding, a competitive LEC reported that the uncertain regulatory status of dark fiber presents a significant barrier to competitive LECs in obtaining these facilities from incumbent providers.[20] The availability of dark fiber is critical for advanced telecommunications services, because fiber optic facilities provide high transmission capacities at relatively low cost. GSA urges the Commission to include this element on the "minimum" list for unbundling.

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17 *Deployment of Wireline Service Offering — Advanced Telecommunications Capability*, CC Docket No. 98–147, Comments of GSA, September 25, 1998.

18 *Id.*, p. 17.

19 *Inquiry Concerning the Deployment of Advanced Telecommunications capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98–146, Reply Comments of GSA, October 8, 1998.

20 *Id.*, Comments of GSA, p 13, citing Comments of Allegiance Telecom, Inc., p. 6.

D. Exclusions to meet "proprietary" claims by incumbent carriers should be limited.

Section 251(d)(2)(A) of the Telecommunications Act arguably opens the door to exclusion of "proprietary" elements from unbundling obligations. However, In the *Local Competition First Report and Order*, the Commission concluded that incumbent LECs' signaling protocols that adhere to Bellcore standards are not proprietary because they use industry–wide, rather than LEC–specific, procedures.[21] In the Notice, the Commission seeks comments on whether incumbent carriers are more generally entitled to proprietary exclusion for network elements if the interfaces, functions, features, and capabilities are defined by any industry standard–setting body.[22]

From their perspective as users seeking more opportunities for competitors to develop their services, GSA urges the Commission to sharply circumscribe the ability of incumbent LECs to use proprietary claims as a reason for not unbundling their networks. Proprietary exclusion should not be granted for capabilities that have been defined in the public domain by any recognized industry body, including Bellcore, the International Telecommunications Union, the American National Standards Institute and the Institute of Electrical and Electronic Engineers. Moreover, "proprietary" status should be specifically limited to information, software, or technology that may be protected by patents, copyrights, or trade secrecy laws. For the purpose of determining unbundling obligations, proprietary claims should not apply to any materials or methods that do not qualify for such legal protection. In addition, features and capabilities that are generally available in the market, under license, should be available to all competitors under similar terms and conditions.

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21 *Local Competition First Report and Order*, para. 481.

22 Notice, para. 15.

III. UNBUNDLING SHOULD BE REQUIRED IF A NETWORK ELEMENT ON THE MINIMUM LIST IS NOT AVAILABLE THROUGH SELF–PROVISIONING OR ANOTHER SOURCE.

In requiring the Commission to revisit its rules concerning UNEs, the Supreme Court stated that it is necessary to address the availability of network elements to competitive carriers from sources outside the incumbent carrier's network.[23] From GSA's perspective, the primary consideration in meeting the Courts' directive is to establish criteria for assessing alternative sources of network elements that will foster more competition in all regions.

The Notice seeks comments on which parities should bear the burdens of proof and production, and whether any presumptions should apply in resolving issues concerning provision of UNEs.[24] GSA urges the Commission to find that burdens of proof and production should rest on the incumbent carrier, because the incumbent firm controls the local telecommunications infrastructure and thus approaches negotiations from a position of greater power. Moreover, in cases with uncertainty, the alternative leading to more competition should "receive the benefit of the doubt." In short, before excusing an incumbent LEC from unbundling, regulators should have confidence that the ability of competitors to serve their customers will not be impaired.

Since the Telecommunications Act does not confer competitors with "blanket access" to the networks of incumbent carriers, the Commission must employ an objective procedure to ensure consistency in determining whether or not competitors have adequate alternatives for the UNE functionalities they require. The first step in the process of assessing whether the incumbent carrier should be required to provide a UNE is to identify alternative sources. Resources that may be provided by additional

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23 *AT&T v. Iowa Utils. Bd.*, at 734–35.

24 Notice, para. 12.

competitive LECs operating in the region should be considered as potential alternatives. However, in evaluating alternatives, a demonstrated capability to meet or exceed operating requirements should be the threshold consideration.

In the *Local Competition First Report and Order*, the Commission established standards for the quality of the UNEs that incumbent LECs must provide to interconnected carriers. In that order, the Commission ruled that the UNEs must be at least equal–in–quality to the equivalent element which the incumbent LEC provides to itself or its own subscribers.[25] GSA recommends that this same criterion be applied in assessing whether the incumbent LEC has sources for UNEs other than the incumbent carrier. Only alternatives that are equal–in–quality to the elements the incumbent LEC provides to itself or its own subscribers should be considered as candidates.

Any alternatives meeting these quality standards, including self–provisioning by the competitive LEC if physically possible, should be evaluated on the basis of the costs and time required for implementation. Use of specific, quantifiable measures of cost and implementation time will provide the greatest possible degree of uniformity in applying the requirements over a period of time in the same or dispersed geographical areas.

IV. CRITERIA FOR ASSESSING ALTERNATIVE SOURCES SHOULD BE STRUCTURED TO FOSTER MORE COMPETITION.

A. Even a moderate cost difference should require incumbent LECs to provide UNEs.

In the *Local Competition First Report and Order* the Commission determined that <u>any</u> increase in cost for a network element could potentially impair a requesting carrier's ability to provide service.[26] However, the Supreme Court ruled that this

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25 *Local Competition First Report and Order*, para. 312.

26 Notice, para. 25.

standard was too stringent, and not consistent with the Telecommunications Act. Consequently, the Notice seeks comments on "the extent to which the Commission should consider differences in costs between obtaining the network element from the incumbent carrier as opposed to self–provisioning or an alternative source."[27]

Although "equal" costs may not be an appropriate standard, GSA urges the Commission to require only a moderate cost difference. The incumbent LEC is not providing the UNE without compensation. The carrier is obtaining revenues to at least cover its costs, including a return on the net investment in the facility, so that significant extra compensation is not justified. At the maximum, GSA recommends a differential of 10 percent of discounted costs over the following year. Thus, if it would cost competitors at least 10 percent more (in future discounted costs) to self–provision or obtain the element from another source, unbundling would be considered a prerequisite to avoid economic barriers to competition in a locality.

Moreover, comparisons between alternatives for providing network elements should reflect Total Element Long Run Incremental Costs ("TELRIC") because these are the appropriate measures for services provided to interconnected carriers. Also, the TELRIC employed for this process should be based on the most efficient network architecture, sizing, technology and operating structure that is feasible and currently available in the industry.

B. Delays with self–provisioning or other alternative sources should also dictate unbundling.

The achievable implementation schedule is an additional quantitative factor to be considered in evaluating alternative sources of network elements. As in evaluating relative costs, "no difference" may provide an unreasonable standard. Again, however, GSA urges the Commission to set a standard that will not hold competitors

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27 Notice, para. 25.

hostage and delay benefits for end users. In this context, GSA suggests that if it would require competitors 60 days more to self–provision or to obtain a necessary network elements from an alternative source, the incumbent LEC should be required to unbundle.

The Notice suggests an additional related consideration — the "quantity of facilities that may be necessary for new carriers to compete effectively."[28] To address requests to provide larger quantities of UNEs, it may be necessary to consider a competitor's request in parts. If a competitive LEC can meet a part, but not all, of its total new demand through self–provisioning (within the cost limits described above) it should be required to do so. The incumbent LEC should be required to meet the remainder, if that is feasible. On the other hand, incumbent LECs should not be able to rely on an assertion that they are not able to fully meet the requests of a competitor, or all competitors in the aggregate, as a basis for claiming they need provide no unbundled facilities at all.

V. THE SUPREME COURT'S DECISION OPENS THE DOOR FOR THE COMMISSION TO AGAIN REQUIRE INCUMBENT CARRIERS TO COMBINE UNBUNDLED NETWORK ELEMENTS.

The Commission's Rule 315(b), established pursuant to the *Local Competition First Report and Order*, required incumbent LECs to combine network elements on behalf of requesting competitive carriers.[29] The Eighth Circuit vacated this rule, stating that the plain language of Section 251(c)(3) of the Telecommunications Act indicates that requesting carriers will combine the UNEs themselves.[30] The Notice requests

28 *Id.*, para. 27.

29 47 CFR §51.315(b).

30 *Iowa Utils Bd.* at 813.

comments on whether the Commission can again require incumbent LECs to make these combinations themselves in view of the decision by the Supreme Court.[31]

In GSA's view, the Supreme Court's decision allows the Commission to require incumbent LECs to combine UNEs. While the Court noted that Section 251(c)(3) of the Telecommunications Act was ambiguous as to whether leased network elements "may" or "must" be separated, the Court concluded that a rational basis for the "rebundling requirement" could be found in the prohibition against discrimination in this legislation.[32]

Noting that Rule 315(b) may allow competitive carriers access to a pre–assembled network, the Court ruled that such a result is allowable because the Commission should be able to prevent the anti–competitive practice of "disconnect[ing] previously connected elements, over the objection of the requesting carrier, not for any productive reason, but simply to impose redundant reconnection costs on new entrants.[33] Thus, the Court found that Rule 315(b) was a reasonable interpretation of Section 251(c)(3) of the Telecommunications Act. In view of this decision, GSA urges the Commission to affirm its previous rulings requiring incumbent LECs to combine network elements.

VI. MEASURES OF COMPLIANCE WITH UNBUNDLING REQUESTS SHOULD BE INCLUDED IN THE PRICE CAP PLAN FOR INCUMBENT CARRIERS.

The Commission's price cap plan structure is intended to motivate incumbent LECs to reduce costs, without sacrificing the quality of the services they provide to end users or interconnected carriers. Including a penalty factor for failure to meet

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31 Notice, para. 33.

32 *AT&T v. Iowa Utils. Bd.* at 736–38.

33 *Id.*

unbundling requirements in the price cap plans will help motivate incumbent LECs to respond to requests by competitive carriers.

Without financial incentives, incumbent LECs have too little motivation to help create additional competition by moving expeditiously to provide UNEs to interconnected carriers. To maximize unbundling, GSA urges the Commission to incorporate a factor reflecting compliance with unbundling requirements in the price cap plan employed for the large incumbent LECs.

The regulatory plan employed for the major incumbent LECs under this Commission's jurisdiction includes a measure of inflation for the total economy, a "productivity offset" to reflect the exceptional level of productivity improvement in the telecommunications industry, and an "exogenous factor" to reflect external impacts on the carrier's costs.[34] A substandard level of meeting requests by competitors for UNEs could be reflected by an adjustment to the price cap index. To implement this procedure, a factor — such as an adjustment of one or two percentage points — would be included in the price cap formula.[35] The inclusion of this term or a similar procedure to modify the productivity offset would provide a direct incentive for incumbent LECs to respond to unbundling requirements of competitive LECs.

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34 CC Docket No. 94–1, Fourth Report and Order, released May 21, 1997.

35 With GSA's recommended modification, the price cap formula would have the form:

$GDP\text{–}PI - X \pm Z - Q$,

where:

GDP–PI = the annual percentage change in a measure of economy–wide price inflation, such as Gross Domestic Product Price Index;

X = a productivity measure to capture the cost–decreasing effects of anticipated annual improvements in the LEC's productivity and input price levels (6.5 percent under the Commission's plan);

Z = potential adjustments to reflect external or "exogenous" inputs; and

Q = an adjustment to reflect substandard performance, if applicable.

VII. REQUIREMENTS TO PROVIDE UNBUNDLED NETWORK ELEMENTS SHOULD NOT SUNSET UNTIL COMPETITION IS FIRMLY ESTABLISHED IN A LOCALITY.

The Notice observes that changes in technological, competitive, and economic factors over time may significantly increase the availability of network elements from sources outside the incumbent LEC's network.[36] Consequently, the Commission requests comments on what steps it should take to plan for deletion of a particular element from unbundling requirements.[37]

GSA acknowledges that as a competitor becomes more firmly established in a region, its ability to self–provision will increase, and its dependence on the incumbent carrier will decline correspondingly. For example, as a competitor gains a larger market share, it should be able to provide the necessary capabilities as cheaply and quickly as the (former) incumbent carrier. Therefore the procedures outlined previously in these Comments will "sunset" logically in these circumstances.

For all network elements, however, the same considerations apply to "sunset" as to the establishment of obligations for unbundling at the start. In both cases, the needs of competitors for network elements in an area must be the primary consideration. It is unlikely that the Commission could eliminate the requirements to provide any UNE everywhere without impairing the chances for competition in some localities. Therefore, opportunities for "sunset" should be considered only on a geographically defined basis. Moreover, as with setting the initial requirements to unbundle, uncertainties should be resolved in favor of the course that allows the most competition to develop.

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36 Notice, para. 36.

37 *Id.*

VIII. CONCLUSION

As a major user of telecommunications services, GSA urges the Commission to implement the recommendations set forth in these Comments.

Respectfully submitted,

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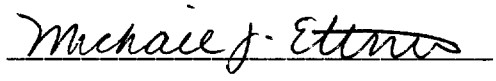

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I, MICHAEL J. ETTNER, do hereby certify that copies of the foregoing "Comments of the General Services Administration" were served this 26th day of May, 1999, by hand delivery or postage paid to the following parties.

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